United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Arrgued w/ affidavit of mailing

74-2682

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To be argued by
EDWARD R. KORMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2682

LAWRENCE D'ALLESANDRO,
Petitioner-Appellee,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLANT

DAVID G. TRAGER,
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STEPHEN M. BEHAR,
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TABLE OF CONTENTS

TABE OF CASES

OTHER AHTHORITIES

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Preliminary Statement

The United States of America appeals, pursuant to Title 28 United States Code, § 1291, from an order of the United States District Court (Weinstein, *J.*), entered on November 12, 1974, which granted a motion by the petitioner-appellee, Lawrence D'Allesandro to vacate a judgment entered upon his plea of guilty convicting him of distributing heroin in violation of Title 21, United States Code, Section 841(a)(1). After this motion was granted, the petitioner-appellee again pleaded guilty to the same offense, but this time the period of confinement which had previously been imposed—four years—was reduced to time served and Mr. D'Allesandro was released from confinement on November 20, 1974.

This appeal is taken because the action of Judge Weinstein in granting the motion to vacate the original judg-

ment of conviction was a transparent attempt to usurp the powers of the Board of Parole and overcome the limitations placed upon his power to reduce sentence by Rule 35 of the Federal Rules of Criminal Procedure. We are seeking here to vindicate the principle "fundamental to our jurisprudence[,] that the rule of law must prevail and that the prosecution of those suspected of crime must itself proceed according to law, and not otherwise." *United States* v. *Fein,* 504 F.2d 1170, 1180-81 (C.A. 2, 1974).

Statement of Facts

1. On December 1, 1972, a judgment was entered, by the United States District Court for the Eastern District of New York, convicting Lawrence D'Allesandro upon his plea of guilty, of distributing heroin in violation of Title 21 United States Code, Section 841(a)(1). The defendant was sentenced to four years imprisonment, a three year special parole term and fined $10,000. The plea entered by Mr. D'Allesandro was pursuant to a plea bargain which resulted in the dismissal of (1) four remaining counts of the indictment against him; (2) three counts against his mother, and (3) a complaint which had charged him with threatening the life of a principal witness for the prosecution, shortly before another cooperating witness had been murdered (cf. App. 95).

2. On July 3, 1974, after having served over a year and a half of the four year sentence, Mr. D'Allesandro wrote to Judge Weinstein and asked him to vacate the judgment of conviction on the ground, *inter alia,* that "I never pled guilty to the crime which I am now incarcerated for" (App. 63). Mr. D'Allesandro's claim was based on a portion of the transcript of the stenographic minutes of his plea, which he enclosed with his letter, that appeared to indicate that, after the entire procedure for accepting a plea

of guilty had been followed, and after Mr. D'Allesandro admitted he was pleading guilty "because I am guilty", Mrs. D'Allesandro, the defendant's mother, had answered "Guilty" to a final question put by Judge Weinstein, to wit: "How do you plead, guilty or not guilty" (see, App. 63-73).

Judge Weinstein, upon receiving the letter and its enclosure, ordered the United States Attorney to make "an investigation and report to the Court in writing" (App. 62). In response, the Assistant United States Attorney contacted the Official Court Reporter, and was advised that the reference to "Mrs." D'Allesandro, upon which the motion to vacate sentence was based, "was merely the result of a reporter's error" (App. 75). The district court was thus advised in writing that:

> "The court reporter, Mr. Miele, has informed the writer that his original stenographic notes of the plea do not contain the reference to '*Mrs.*' at that point" (*id.*)

After being so advised, Judge Weinstein ordered a hearing at which (1) the defendant declined to call the Official Court Reporter (App. 88); (2) the defendant, his mother and his lawyer disclaimed any recollection of who had answered the question at issue (App. 85-88); (3) the court clerk of the district court stated that his records, made contemporaneously, indicated that Mr. D'Allesandro had in fact entered a plea of guilty (App. 96-97); and (4) Judge Weinstein stated to Mr. D'Allesandro that he personally recalled that he read "the count to you and I addressed you, not your mother" (App. 85).

When it thus, became apparent that the motion to vacate the plea was frivolous, Mr. D'Allesandro's counsel advised Judge Weinstein that "I think that Mr. D'Allesandro most probably has taken the position that he's taken here because of the problems that we're having with prison authorities

[in obtaining parole]" (App. 88-89). After further discussion of this "problem", Judge Weinstein stated:

> "In effect, you're asking me to reduce the sentence. Let me look at the Probation report. Give me the Probation report and I'll consider that." (App. 92)[1]

Judge Weinstein then stated that he would take a "short recess":

> "We'll take a short recess. Look at the Probation report, sit down and discuss it with your client and take it up with the United States Attorney and see what he can do. I won't decide this motion at this moment." (App. 92)

After the recess and additional discussion of the "problems" that Mr. D'Allesandro was having with "prison authorities", Judge Weinstein acknowledged again his inability to alter the sentence. He then suddenly announced:

> "[I]n view, however, of the serious question about the validity of the plea and the confusion which may have been engendered in the mind of the defendant, and the mind of his mother, the defendant is to have his plea set aside and the Court will entertain an application now, if he wishes to consider repleading." (App. 100)

The defendant's lawyer, without any apparent discussion with his client, immediately accepted Judge Weinstein's offer:

> "Mr. La Rossa: May it please this Court, the defendant does have an application. Defendant Lawrence D'Allesandro, moves to withdraw the plea of not guilty and enter a plea of guilty to Count Two of the indictment." (App. 100)

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[1] Only a minute earlier, Judge Weinstein acknowledged that because 120 days had elapsed since the conviction became final "my time—the time expired really to rectify that" (App. 90). Indeed, Judge Weinstein had previously denied a timely motion to reduce sentence (App. 13).

After going through the formalities of the plea, the district court sentenced the defendant "to four years to serve six months with credit for time served, remaining three years and six months to be on probation with a three-year special parole term." Judge Weinstein then stated:

> "On motion of the United States Attorney, Counts One, Three and Four and Five are dismissed." (App. 103)

When the Assistant United States Attorney stated that he would like "the record to show I have not entered that motion," Mr. D'Allesandro's lawyer moved "to dismiss those open counts" (App. 103). Judge Weinstein then granted the motion. Of course, Judge Weinstein forgot that those counts had already been dismissed when the defendant had originally pleaded guilty and had never been reinstated. Had they not been so dismissed, his action in dismissing them in the manner in which he did would have been equally improper. *United States* v. *Gray,* 448 F.2d 164 (C.A. 9, 1971).

3. After the plea was accepted, and the Assistant United States Attorney asked for a written opinion, the district court—almost as an afterthought—found "as a matter of fact the sentence was invalid." His oral statement in full is as follows:

> "The Court: Well, I'm not going to grant a written opinion now. We have an oral statement. There is a serious question about what happened on the day of sentencing. Nobody has a direct recollection. The only record we have of the reporter indicates that there was a confusion.
>
> Clerk's minutes do indicate no confusion, but there is a serious doubt and I think in view of the serious doubt justice requires motion be granted.

> And I find as a matter of fact that the sentence was invalid because the plea was not properly taken. A written one, the practice now, is to put those things on tape." (App. 105)

ARGUMENT

The order of the district court was a transparent and invalid device designed to evade the limitations in F.R.C.P. 35 and had no legitimate basis in the record.

I. Introduction

The order of the district court vacating the judgment of conviction, as the record of the hearing alone makes clear, constituted a blatant effort by a district court judge to usurp the powers of the Board of Parole and to evade the limitation on his power to reduce sentence. Although Judge Weinstein attempted to insulate his conduct from further appellate review by finding "as a matter of fact" that the plea was not properly taken, that is a conclusion of law to be drawn from the facts. On the basis of the undisputed facts, even assuming *arguendo* that the appellee established by "a preponderence of the evidence," *Miller* v. *United States*, 261 F.2d 546 (C.A. 4, 1958), that his mother had answered the question at issue, it is plain that a plea of guilty was properly entered by the defendant. Moreover, it is submitted that the record clearly establishes, what is plain from the minutes of pleading, that the reference to "Mrs." D'Allesandro was nothing more than an error in transcription; and, indeed, because the record plainly indicated that the petitioner-appellee had pleaded "guilty," not even the petitioner-appellee or his mother was prepared to swear under oath that he, instead of Mrs. D'Allesandro, had answered the question at issue.

II. The minutes of the plea conclusively establish that the appellee entered a valid plea of guilty

At the very outset of the plea proceedings Mr. D'Allesandro's lawyer, speaking on his behalf and in his presence, stated to the district court:

> May it please the Court, on behalf of the defendant Lawrence D'Allesandro, Jr., I most respectfully make the following application:
>
> The defendant desires to withdraw the plea of not guilty previously interposed and to offer a plea to the second count of the indictment, No. 72 Cr. 970. (App. 35)

The district court then embarked on a model examination of Mr. D'Allesandro so as to insure that the plea would fully conform to the requirements of Rule 11, *F. R. Crim. P.* Besides having determined that the plea was voluntary, that Mr. D'Allesandro fully understood the consequences of the plea and that was a factual basis for the plea, the district court also had ample evidence that Mr. D'Allesandro fully understood the nature of the charge. Even before having count two read to him, Mr. D'Allesandro stated to the Court, "I did what it says, Your Honor * * * You know, I possessed an ounce of heroin and distributed an ounce of heroin" (App. 40). The standards of Rule 11 had been fulfilled before the questioned response. Moreover, any doubts that Mr. D'Allesandro actually stated he was guilty, and that he was pleading guilty, were resolved by the foregoing statements. But if there is a ritualistic necessity for a defendant to utter the word "guilty", the ritual was surely satisfied in the following colloquy:

> "The Court: Are you making this plea because you think you are guilty or because you want to get your mother off?

The Defendant D'Allesandro: Not because of that, because I am guilty.

The Court: Are you guilty or what?

The Defendant D'Allesandro: Yes, your Honor." (App. 41-42)

Therefore, even if the district court had never asked the specific question "How do you plead, guilty or not guilty?", or indeed, had Mrs. D'Allesandro actually answered the question, there would be no legal basis for concluding, a year and a half later, that the plea was not properly taken. The district court addressed the defendant personally, all of the critical warnings were given, there was plainly a factual basis for the plea of guilty and the defendant admitted he was pleading guilty because he was guilty.

In the face of this overwhelming evidence, Mr. D'Allesandro relied upon, what on its face appears to be an error in transcribing the stenographic minutes.[2] We shall now show that, even if it was crucial to determine whether Mr. D'Allesandro or his mother answered the final question put by Judge Weinstein "How do you plead, guilty or not guilty?" the record plainly establishes that it was the defendant who so answered.

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[2] Faced with these facts, that even without the challenged colloquy a perfectly proper plea was entered, that all the other evidence on the record compels the conclusion that the questioned response was Mr. D'Allesandro's and not his mother's and that D'Allesandro's claim was totally without evidentiary support, the court should have denied the motion without a hearing. See *Americo Michel* v. *United States*, — F.2d —, (C.A. 2, Slip Opinion, 523 at 527, December 2, 1974); *Williams* v. *United States*, 503 F.2d 995, 998 (C.A. 2, 1974).

III. The defendant, and not his mother answered "guilty" to the question put by the District Court

1. The stenographic notations from which the minutes were transcribed, and which are the best evidence of what transpired, do not contain the word "Mrs." before the name D'Allesandro. The district court was so advised in writing by the Assitant United States Attorney handling the case pursuant to Judge Weinstein's direction that Mr. D'Allesandro's claim be investigated and that a written report be made to the district court. Moreover, in the face of this representation, the defendant declined an offer by the district court to call the Official Court Reporter.[3]

There is here not only absent any affirmative evidence to support the defendant's claim—it will be remembered that at the crucial point in the hearing, when unsworn allegations no longer sufficed, neither Mr. D'Allesandro, his mother nor his lawyer could recall who answered the question at issue—but Judge Weinstein's own recollection and the district court's record plainly established that, in fact Mr. D'Allesandro answered the question. Thus Judge Weinstein told Mr. D'Allesandro at the hearing:

> "Then, I turned to you and addressed you. I will read the count to you and I addressed you, not your mother.
>
> Now, I don't know why the reporter has Mrs. D'Allesandro pleading guilty" (App. 85).

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[3] After the motion had been granted a formal affidavit by the Official Court Reporter was filed (App. 108). In a cover letter the Assistant United States Attorney explained that he had been taken somewhat by surprise by the district court's action, and that he wanted the record to be completed (App. 107).

Judge Weinstein also established, through the interrogation of the deputy clerk assigned to him, that the district court's own records showed that Mr. D'Allesandro had personally entered a plea of guilty:

> "The Court: Excuse me. The Clerk is here. What does the Clerk's records show?
>
> The Clerk: Clerk's minutes show Defendant D'Allesandro, James [sic] on that day pleaded guilty and was advised of his rights by the Court.
>
> The Court: What is the practice of keeping such minutes?
>
> The Clerk: The practice is, when defendant pleads guilty or not guilty, it is written in the Clerk's minutes.
>
> The Court: Based on the normal practice, would you conclude therefore that the defendant did plead guilty; that is, Mr. D'Allesandro?
>
> Mr. D'Allesandro: Yes.
>
> The Court Clerk: According to my practice, pleaded guilty." (App. 96-97).

Accordingly, Mr. D'Allesandro's allegation in his motion, that "I never pled guilty to the crime which I am now incarcerated for" is totally unsupported by the record. Moreover, it is plain that, even if Judge Weinstein's "finding of fact" is construed as a finding that Mr. D'Allesandro did not, as he alleged only in his motion, plead guilty to the crime with which he is charged, that finding is so clearly erroneous that it should not be permitted to stand.

CONCLUSION

What is at stake is not whether Lawrence D'Allesandro should serve another year in jail, nor do we wish to become engaged in a debate over that issue. Rather the principle at stake here, is similar to that in *United States* v. *Fein*, 504 F.2d 1170, 1179 (C.A. 2, 1974), where the Court saw "no reason to become enmeshed in the long-continuing debate * * * as to whether the grand jury constitutes a sword or a shield." Rather, here as in *Fein*, the issue is simply whether the limitations on the power of a district court judge contained in the Federal Rules of Criminal Procedure are to be followed, or whether here they can be avoided by sham findings of fact. We believe that here, as in *Fein* (*id.*, at 1181) "the rule of law must prevail" and that the judgment of the district court must be reversed.

Dated: February 7, 1975

Respectfully submitted,

DAVID G. TRAGER,
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Chief Assistant United States Attorney.

STEPHEN M. BEHAR,
Assistant United States Attorney,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 7th day of February 19 75 he served ~~xxspy~~ two copies of the within

Brief for Respondent-Appellant

by placing the same in a properly postpaid franked envelope addressed to:

LaRossa, Shargel & Fischetti, Esqs.
522 Fifth Avenue
New York, N. Y. 10036

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

7th day of February 19 75

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501965
Qualified in Kings County
Commission Expires March 30, 19 7 7